ACCESS & EDRi's COMMENTS ON THE ITALIAN PRESIDENCY PROPOSAL ON THE TELECOMS SINGLE MARKET

EDRi and Access welcome efforts of the Italian Presidency of the Council of the European Union to move forward on the Telecoms Single Market dossier, but would like to make some comments on selected proposed provisions below.

The left column repeats the Commission proposal; the right column contains the text proposed by the Italian Presidency. Our comments can be found below. For ease of reading, the headings are highlighted and marked with arrows:

• green for proposals which we welcome (++);

• yellow for proposals which pursue good aims, but could benefit from further suggested improvements (+);

• red for proposals which in our view should be reconsidered (-).

In each case, a short justification is given.

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Article 2 – paragraph 12 - point a ++	
	12a. "net neutrality" means the principle according to which all internet traffic is treated equally, without discrimination, restriction or interference, independently of its sender, recipient, type, content, device, service or application;
• We welcome this addition providing a clear and binding definition of net neutrality, which is fundamental to safeguard the internet's core value for freedom of expression and to ensure growth and innovation in the online market.	

Article 2 – paragraph 14 +	
(14) "internet access service" means a publicly available electronic communications service that provides connectivity to the internet, and thereby connectivity between virtually all end points ***connected to*** the internet, irrespective of the network technology used;	(14) "internet access service" means a publicly available electronic communications service that provides connectivity to the ***open*** internet ***in accordance with the principle of net neutrality,*** and thereby connectivity between virtually all end points of the internet, irrespective of the network technology ***or terminal equipment*** used;
• The addition of the word "open" before "internet" in the proposal put forward by the Italian Presidency implicitly accepts discrimination, as it implies the existence of an undefined, non-open, internet, where the principles of net neutrality would not have to apply. As there is no positive reason to include the word, suggest deleting "open". • Nonetheless the application of the principle of net neutrality to all internet access services is a very positive addition.	

Article 2 – paragraph 15 -	
(15) "specialised service" means an electronic communications service ***or any other service that provides the capability to access*** specific content, applications or services, or a combination thereof, ***and whose technical characteristics are controlled from end-to-end or provides the capability to send or receive data to or from a determined number of parties or endpoints;*** and that is not marketed or ***widely used*** as a substitute for internet access service;	***(15)"*** specialised service" means ***a service provided by means of*** electronic communications that is ***optimised for*** specific content, applications or services, or a combination thereof, ***offering enhanced quality from end to end,*** and that is not marketed or usable as a substitute for internet access service;
• The proposed definition of specialised services by the Italian Presidency still permit discrimination as access to existing online services could be marketed as specialised services.	

The definition has to prevent reclassification of normal online services as specialised services.

- It is still unclear which problem(s) the Commission's initial proposal is trying to solve in the market with his legally unclear and far too broad definition of specialised services. Insofar as specialised services are fully separate from internet access services and can't be used to undermine the principle of net neutrality, their inclusion is not necessary in the Regulation. We therefore suggest that the Council consider deleting this definition, as long as a clear and binding definition of net neutrality remains and provisions against price discrimination are added. (See article 23)

Article 21 ++	
Article 21 – Elimination of restrictions and discrimination ***1. The freedom of end-users to use public electronic communications networks or publicly available electronic communications services provided by an undertaking established in another Member State shall not be restricted by public authorities.*** ***2. Providers of electronic communications to the public shall not apply any discriminatory requirements or conditions of access or use to end-users based on the end-user's nationality or place of residence unless such differences are objectively justified.*** 3. ***Providers of electronic communications to the public shall not apply tariffs for intra-Union communications terminating in another Member State which are higher, unless objectively justified:*** ***a) as regards fixed communications, than tariffs for domestic long-distance communications;*** ***b) as regards mobile communications, than the euro-tariffs for regulated voice and SMS roaming communications, respectively, established in Regulation (EC) No 531/2012.***	***(deleted)***
• In the absence of a meaningful impact assessment from the Commission, it is unclear what problems may exist, have existed or were expected to exist that would have been solved by	

this text.

Article 23 - paragraph 1 +	
1. End-users shall ***be free*** to access and distribute information and content, run applications and ***use*** services of their choice via their internet access service. ***End-users shall be free to enter into agreements on data volumes and speeds with providers of internet access services and, in accordance with any such agreements relative to data volumes, to avail of any offers by providers of internet content, applications and services.***	1. End-users shall ***have the right*** to access and distribute information and content, run ***and provide*** applications and services ***and use terminals*** of their choice, ***irrespective of the end-user's or provider's location or the location, origin or destination of the service, information or content,*** via their internet access service. ***Providers of internet access services and end-users may agree on prices and to set limits on*** data volumes or speeds ***for internet access services.***
• We welcome the change of "be free" for "have the right", bringing legal clarity to the text. • In addition, to avoid price discrimination, we suggest adding, based on the Dutch net neutrality law, the following provision: "*Providers of electronic communications to the public should not make the price of the rates for internet access services dependent on the services and applications which are offered or used via these services.*"	

Article 23 – paragraph 2 -	
2. ***End-users shall also be free to agree with either*** providers of electronic communications to the public ***or with*** providers of content, applications and services ***on the provision of*** specialised services ***with an enhanced quality of service.*** ***In order to enable the provision of specialised services to end-users, providers of content, applications and services and providers of electronic communications to the public shall be free to enter into agreements with each other to transmit the related data volumes or traffic as specialised services with a defined quality of service or dedicated capacity. The provision of specialised services shall not impair in a recurring or continuous manner the general quality of internet access services.***	***2.*** Providers of electronic communications to the public ***and*** providers of content, applications and services ***shall be free to offer*** specialised services ***to end-users.*** ***Such services shall only be offered if sufficient network capacity is available to avoid any detriment to the availability or general quality or experience of internet access services at any given time. Providers of internet access services shall not discriminate between specialised services.***

- The final sentence of the text is unhelpful. Specialised services are products that are independent of internet access products. There is no obvious need to specifically legislate to ensure that access providers not discriminate between the different specialised services they offer. Instead, a provision that prevents the real, economically feasible thread of discrimination between online services and specialised services is clearly needed.

- The real network capacity of any ISP is considered highly business sensitive information and is so far not even known to the NRAs. Combining this criterion with fuzzy concepts like quality of experience would reduce legal clarity and regulatory practicability of these provisions.

- Following our previous recommendation to delete the definition of specialised services, We suggest deleting this provision.

- If this provision was to stay, changes would be needed to ensure that discrimination do not happen *between* specialised services but between internet access services and specialised services and online services.

Article 23 – paragraph 3 +	
3. This Article is without prejudice to Union or national legislation related to the lawfulness of the information, content, application or services transmitted.	3. This Article is without prejudice to Union or national legislation related to the lawfulness of the information, content, application or services transmitted ***and to lawful measures to block access to web pages containing or disseminating child pornography consistent with Article 25 of Directive 2011/93/EU***.
• The addition brought by the Italian Presidency does not alter the meaning of this provision but is somehow redundant. The provision already stated that this Article is "without prejudice to Union" law, therefore including the 2011/93/EC Directive. The amendment does, helpfully, definitively disprove the argument that net neutrality will somehow harm the fight against online child abuse.	

Article 23 - paragraph 4 ++	
4. The exercise of the freedoms provided for in paragraphs 1 and 2 ***shall be facilitated by the provision of*** complete information in accordance with ***Article 25(1), Article 26 (2), and Article 27 (1) and (2).***	***4. End-users shall be provided with*** complete information in accordance with ***Article 20(2), Article 21(3) and Article 21a of Directive 2002/22/EC, including information on any traffic management measures applied that might affect access to and distribution of information, content, applications and services as specified in paragraphs 1 and 2 of this Article.***

- We welcome the changes proposed by the Italian Presidency which will benefit transparency and end-users' access to information on traffic management measures. However, it must be as a support for non-discrimination measures and not a replacement for them.

Article 23 - paragraph 5.1 ++	
5. ***Within the limits of any contractually agreed data volumes or speeds for internet access services***, providers of internet access services shall not ***restrict the freedoms provided for in paragraph 1 by*** block***ing***, slow***ing*** down, degrad***ing*** or discriminat***ing*** against specific content, applications or services, or specific classes thereof, except in cases where ***it is necessary to apply reasonable traffic management measures. Reasonable*** traffic management measures shall be transparent, non-discriminatory, proportionate and necessary to:	5. Traffic management measures shall be transparent, non-discriminatory and proportionate. Providers of internet access services shall not ***apply traffic management measures which*** block, slow down, ***alter,*** degrade or discriminate against specific content, applications or services, or specific classes thereof, except in cases where ***such measures are*** necessary to:

- The proposal put forward by the Italian Presidency brings needed improvement to the Commission's text. We welcome the deletion of the first sentence, bringing legal clarity to the text and removing risks of discrimination. For clarity, it would have been helpful to say "discriminate between" rather than "against".

Article 23 - paragraph 5 – point a ++	
a) implement a legislative provision or a court order***, or prevent or impede serious crimes***;	a) implement a legislative provision or a court order;

- We welcome the deletion proposed by the Italian Presidency as it removes the flagrant breach of Article 52 of the European Charter of Fundamental Rights introduced by the Commission's text.

Article 23 - paragraph 5 – point b -	
b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminals;	b) prevent the transmission of unsolicited communications, ***or, within the framework of parental control, age-inappropriate content,*** to end-users who have ***previously requested*** such restrictive measures

- The proposed changes does not bring the needed clarity to the text. "Unsolicited communications" is not defined and could be broadly interpreted (does it refer to the blocking of embedded content?).

- Filtering that is relevant in the case of this article is not normally controlled by the parent ("parental control") but one-size-fits-all solutions imposed by the ISP. Since parental controls are normally installed on end-user devices, there is no need to reference this exception in this article as it will not apply to all internet access services. Nothing in this Regulation will impede each family to install their own "parental control" on their personal devices.

Article 23 - paragraph 5 – point c i & ii -	
c) prevent the transmission of unsolicited communications to end-users who have given ***their prior consent to*** such restrictive measures; *d)* ***minimise the effects of temporary or exceptional network congestion*** provided that equivalent types of traffic are treated equally.	***c) ensure the good functioning of their network, in particular*** i) preserve the integrity and security of the network, services provided via this network, and the end-users' terminals; or ***ii) prevent imminent network congestion or mitigate its effects*** provided that ***such congestion is exceptional in character and that*** equivalent types of traffic are treated equally.
- The addition made in the first sentence authorising traffic management measures to "ensure the good functioning of their network" is far too broad and could lead to abuse. "In particular" means "including, but not limited to", which is very unclear. For the net neutrality provisions to be beneficial to citizens and ensure competition in the market, this sentence should be deleted..	

Article 23 - paragraph 5.2 ++	
Reasonable traffic management shall only entail processing of data that is necessary and proportionate to achieve the purposes set out in this paragraph.	***Such measures shall not be maintained longer than necessary.*** ***Without prejudice to Directive 95/46,*** traffic management measures shall only entail such processing of personal data that is necessary and proportionate to achieve the purposes set out in this paragraph, ***and shall also be subject to Directive 2002/58, in particular with respect to confidentiality of communications.***
- We welcome the addition put forward by the Italian Presidency bringing important clarification for users' right to privacy and data protection.	

Article 24 +	
Article 24 - Safeguards for quality of service 1. National regulatory authorities shall closely monitor ***and ensure the effective ability of end-***	Article 24 - Safeguards for quality of service 1. ***In exercising their powers under Article 30a with respect to*** Article 23***,*** national regulatory

users to benefit from the freedoms provided for in Article 23 ***(1) and (2),*** compliance with Article 23 (5), and the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology ***and that are not impaired by specialised services***. ***They shall, in cooperation with other competent national authorities, also monitor the effects of specialised services on cultural diversity and innovation.*** National regulatory authorities shall ***report*** on an annual basis to the Commission and BEREC ***on*** their monitoring and findings.	authorities shall closely monitor compliance with Article 23(5) and the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. ***They shall have regard to [increases in] the capacity available for internet access services in determining whether the capacity employed for specialised services is compliant with Article 23(2), second sub-***paragraph. National regulatory authorities shall ***publish reports*** on an annual basis ***regarding*** their monitoring and findings***, and provide those reports*** to the Commission and BEREC.
2. In order to prevent the general impairment of quality of service for internet access services or to safeguard the ability of ***end-***users to access and distribute content or information or to run applications and services of their choice, national regulatory authorities shall have the power to impose minimum quality of service requirements on providers of electronic communications to the public. National regulatory authorities shall, in good time before imposing any such requirements, provide the Commission with a summary of the grounds for action, the envisaged requirements and the proposed course of action. This information shall also be made available to BEREC. The Commission may, having examined such information, make comments or recommendations thereupon, in particular to ensure that the envisaged requirements do not adversely affect the functioning of the internal market. ***The envisaged requirements shall not be adopted during a period of two months from the receipt of complete information by the Commission unless otherwise agreed between the Commission and the national regulatory authority, or the Commission has informed the national regulatory authority of a shortened examination period, or the Commission has made comments or recommendations.*** National regulatory authorities shall take the utmost account of the Commission's comments or recommendations and shall communicate the adopted requirements	2. National regulatory authorities shall have the power to impose, by means of a decision, minimum quality of service requirements, ***and where appropriate, other quality of service parameters,*** on providers of electronic communications to the public to the extent necessary in order to prevent the general impairment of quality of service for internet access services or to safeguard the ability of users to access and distribute content or information or to run applications, services ***and software*** of their choice. National regulatory authorities shall, in good time before imposing any such requirements, provide the Commission with a summary of the grounds for action, the envisaged requirements and the proposed course of action. This information shall also be made available to BEREC. The Commission may, having examined such information, make comments or recommendations thereupon, in particular to ensure that the envisaged requirements do not adversely affect the functioning of the internal market. National regulatory authorities shall take the utmost account of the Commission's comments or recommendations and shall communicate the adopted requirements to the Commission and BEREC. 3. ***Within six months of adoption of this regulation, BEREC shall, after consulting stakeholders and in close cooperation with*** the Commission***, lay down general guidelines*** defining uniform conditions for the implementation of the obligations of national competent authorities un-

to the Commission and BEREC. 3. The Commission ***may adopt implementing acts*** defining uniform conditions for the implementation of the obligations of national competent authorities under this Article***. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 33 (2)***.	der this Article***, including with respect to the application of traffic management measures and for monitoring of compliance***.
• We welcome the modification brought by the Italian Presidency which provides improvements regarding the reporting obligation for the NRAs. • Following our recommendation to delete the definition of specialised services, we suggest changing the first paragraph as follows: "National regulatory authorities shall closely monitor compliance with and ensure the continued availability of non-discriminatory internet access services in accordance with article 2.12.a. and 23.5". The following sentence should be deleted: "They shall have regard to [increases in] the capacity available for internet access services in determining whether the capacity employed for specialised services is compliant with Article 23(2), second sub-paragraph". This level of micro-management of the work of NRAs is clearly unnecessary. • By providing efficient monitoring for the compliance of net neutrality principle and traffic management measures, NRAs have a crucial role in guaranteeing users with the enjoyment of a competitive market free of discrimination where innovation and freedom of expression can thrive. In this regard the mandate of NRAs should not exclude monitoring of compliance with Article 23 (1) as this text suggests.	

Article 24 a (new) **-**
Article 24a - Review ***The Commission shall, in close cooperation with BEREC, review the functioning of the provisions on specialised services and, after a public consultation, shall report and submit any appropriate proposals to the European Parliament and the Council by [insert date three years after the date of applicability of this regulation].***
• Following our recommendation to delete the definition of specialised services, we suggest deleting this article. • As it is unclear what problem the Commission intends to solve with its proposal on specialised services, a public consultation and thorough impact assessment of the market would however be a positive development ahead of the upcoming reform of the telecoms package.

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